RECORD AND BRIEFS

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In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the Court of Appeals of Colorado

BRIEF OF PROFESSOR TOBIAS B. WOLFF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Tobias Barrington Wolff is a Professor of Law at the University of Pennsylvania Law School who writes and teaches on the First Amendment. He served as lead counsel in the appellate stages of *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (2014). His work on the First Amendment has focused on compelled speech doctrine and its proper application in commercial and non-commercial settings.

SUMMARY OF THE ARGUMENT

This Court should reject Petitioner's attempt to cloak its discriminatory business conduct in the mantle of free speech. The Speech Clause of the First Amendment has never been a license for businesses to discriminate in the commercial marketplace, and an unbroken line of cases has rejected all such attempts. When a business sells goods and services in the market, it is not engaging in its own expression. Customers do not pay for the privilege of promoting a commercial vendor's message. Customers pay for goods and services tailored to their own needs. Selling commercial goods and services in the marketplace is conduct that the State may regulate, and anti-discrimination statutes like the Colorado Anti-

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[1] Petitioners and respondent Colorado Civil Rights Commission have lodged blanket amicus consent letters with the Court. Respondents Charlie Craig and David Mullins have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity other than amicus and his counsel made a monetary contribution to the preparation or submission of this brief.

Discrimination Act (CADA) do not provoke any First Amendment scrutiny in that setting.

Three well-established principles require the rejection of Petitioner's Speech Clause arguments.

First: Anti-discrimination laws regulate conduct, not speech. Discrimination by a business against its customers or employees in the public marketplace is commercial conduct, regardless of the service the business offers, and it "has never been accorded affirmative constitutional protections." *Hishon* v. *King & Spaulding*, 467 U.S. 69, 78 (1984).

Second: When a business sells goods and services to the public, it is not a "speaker" engaged in its own expression, it is a vendor engaged in business conduct. Customers do not pay for the privilege of facilitating the vendor's message, they pay for a product tailored to their own needs. Many businesses provide goods and services that involve artistic skill or expressive talent: law firms, private schools, architectural firms, and sometimes bakeries. In each case, when the business provides goods and services to paying customers, it is not engaged in its own act of personal expression, it is providing a commercial service.

Third: The compelled speech doctrine has no application in this setting. This Court's cases define and protect against two specific kinds of harm. Compelled speech doctrine rejects *compelled orthodoxy*, prohibiting government from choosing a preferred message and requiring others to promote or facilitate that message, and it protects against *intrusion into private messages*, prohibiting government from dictating to a speaker what content his own message must include. *See Rumsfeld* v. *Fo-*

rum for Academic and Institutional Rights, Inc., 547 U.S. 47, 63–65 (2006) (*FAIR*). These protections are vital, but they are not boundless. The doctrine protects against discrete harms. Those harms are absent in this case.

Attempts to use the Speech Clause to subvert anti-discrimination laws are nothing new. Major steps forward for oppressed groups have often been met with attempts by private business to shield discrimination using the First Amendment. Now that lesbian, gay, bisexual and transgender people have begun to escape their long history of state-sanctioned inequality and secure a measure of equal treatment in the marketplace, another chapter in that story is unfolding. This Court has consistently rejected past attempts to use the Speech Clause to license discrimination in the commercial market. It should do so again here.

ARGUMENT

I. CADA Does Not Regulate Speech.

The Colorado Anti-Discrimination Act does not regulate speech. Nothing in the statute makes reference to speech or expression. *See* Colo. Rev. Stat. 24-34-601. Neither was CADA enacted to punish businesses for their opinions, nor to regulate conduct as a pretext for targeting symbolic speech. On its face and as applied in this case, CADA regulates business conduct: invidious discrimination against customers in the commercial market.

Petitioner argues that it deserves a categorical exemption from CADA because it sells a product that involves creative skill. That is not the law. The First Amendment does not exempt companies from general business regulations simply because they sell creative goods or services. When government enacts evenhanded

laws that regulate the conduct of all businesses, no First Amendment scrutiny is required. Only when government targets the expressive component of a business's activities is the Speech Clause implicated. CADA does no such thing.

In *Hishon* v. *King & Spaulding*, 467 U.S. 69 (1984), this Court applied these principles to the commercial practice of law. Legal practice occupies an important place under the First Amendment: lawyers produce creative work when they advocate for a client, and the legal profession gives meaning to the right of access to court. Nonetheless, commercial legal practice is fully subject to laws that prohibit discrimination in the workplace and the market. *Hishon* held that Title VII of the Civil Rights Act of 1964 forbids a law firm from refusing to promote a female associate because of her sex. *Id.* at 71–72, 77–79. In seeking to avoid that result, the firm argued that it was exempt from Title VII because its work enjoys First Amendment protection. *Id.* at 78. The Court rejected the argument. Title VII neither regulates speech nor targets the expressive content of a company's work. Rather, the Court explained, it targets the conduct of workplace discrimination, and "invidious private discrimination * * * has never been accorded affirmative constitutional protections." *Ibid.*

In contrast, government cannot restrict the viewpoint that lawyers express when arguing on behalf of their clients. The Court affirmed this principle in *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), holding that the Speech Clause prohibits Congress from imposing a restriction that "prevents [a Legal Services] attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute * *

* [violates] the United States Constitution." *Id.* at 536–537. Because Congress sought "to exclude from litigation those arguments and theories [it found] unacceptable," *id.* at 546, its law targeted expression and provoked First Amendment scrutiny, *id.* at 555. In contrast, CADA—like Title VII—does not target the expressive content of any business.

This Court has applied the same principle to private schools. Direct regulation of a private school's expressive content—for example, dictating the viewpoint teachers must convey to students—would present serious First Amendment problems. But discriminatory practices receive no such protection. In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), a private school refused to admit African-American students, prompting the children to sue for admission under section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982. 427 U.S. at 169. The school said that teaching non-White children would violate its segregationist beliefs and argued that the First Amendment gave it a right to discriminate. *Id.* at 175–177. The Court rejected the argument. "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable," the Court explained. *Id.* at 176. "But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." *Ibid.*

The Court reiterated this principle yet again in *Arcara* v. *Cloud Books*, 478 U.S. 697 (1986), a case involving the application of New York's public nuisance law, N.Y. Pub. Health Law 2321, 2329, to force the closure of an adult bookstore after State authorities found that the bookstore was facilitating prostitution on its premises.

478 U.S. at 698–699. Although shuttering the bookstore necessarily impeded its ability to sell certain protected materials, the First Amendment was not implicated. When a law targets conduct and not speech, the Court explained, "we have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction." *Id.* at 706. It is only where the "conduct * * * that drew the legal remedy" has "a significant expressive element" that the Court has subjected such restrictions to scrutiny." *Id.* at 706–707. In the present case, the "conduct * * * that drew the legal remedy" was Masterpiece Cakeshop's discrimination against gay customers. "[I]nvidious private discrimination" lacks a "significant expressive element" and "has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78; *Arcara*, 478 U.S. at 706.

One can imagine a law firm or a private school making the same arguments that Petitioner presses before this Court. A lawyer's work is "expressive activity," Pet. Br. 49, the argument would go. A lawyer "speaks to all who see" her advocating on behalf of her firm, *id.* at 19, signing her name to papers submitted to the court and conveying the client's message. The commercial practice of law is not merely "mechanical" but requires "skills" honed over many years and delivered in the lawyer's distinctive style. *Id.* at 2. Likewise a private school selects its customers (the students) to "express ideas" about how society should function, seeking to "live out" their values while orchestrating a pedagogical environment that will brand the message the school "convey[s]" in its teaching.

Id. at 16, 20. All these assertions would be true. None would call into question the obligation of a law firm or a private school to obey neutral, generally applicable laws that prohibit commercial entities from discriminating in the workplace or the marketplace. The same holds true for Petitioner.

II. CADA Does Not Violate the Compelled Speech Doctrine.

Petitioner's effort to reframe its position as a compelled speech argument does not change the result. This Court has identified two circumstances that can give rise to a compelled speech violation: (1) when the state imposes its chosen message on unwilling adherents, or (2) when state compulsion forces a speaker to incorporate unwanted elements into its own private act of expression. Neither circumstance is present here. CADA does not impose any state-chosen viewpoint, and Petitioner is not propounding its own message when it sells baked goods to its customers.

A. CADA Neither Compels Affirmation of Belief nor Imposes a State-Chosen Message.

West Virginia Board of Education v. *Barnette*, 319 U.S. 624 (1943), was the foundational compelled speech case, establishing the principle that the State may not impose its chosen ideology on unwilling adherents. *Barnette* involved a West Virginia law that required school children to recite the Pledge of Allegiance to the American flag, a patriotic message chosen by the State and involving "affirmation of a belief and an attitude of mind." *Id.* at 633. In striking down the law, the Court declared that government must not "prescribe what shall be or-

thodox in politics, nationalism, religion, or matters of opinion, or force citizens to confess by word or act their faith therein." *Id.* at 642.

This Court has repeatedly applied this principle when government has imposed its chosen message on unwilling speakers. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the Court struck down a Florida law that compelled newspapers to publish responses from political candidates when they ran editorials critical of those candidates. In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), the Court prohibited New Hampshire from penalizing a couple who covered the state motto on their car license plate, holding that the State cannot "require[] an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public," *id.* at 713, nor force drivers to "use their private property as a 'mobile billboard' for the State's ideological message," *id.* at 715. And in *Pacific Gas & Electric Co.* v. *Public Utilities Commission of California*, 475 U.S. 1 (1986) (*PG&E*), the Court prohibited California from compelling a utility company to send customers environmental literature that the State chose based on its viewpoint.

The core violation in each of these cases was the same: The State selected a message and compelled individuals to affirm that message or become unwilling public ambassadors for it. Such compulsion is impermissible if the State's chosen message embodies its own ideology, as in *Barnette* and *Wooley*, or if the State selects a private speaker's viewpoint and requires others to promote it, as in *Tornillo* and *PG&E*.

CADA involves no such compulsion. The statute does not impose the State's own message on unwilling speakers. Neither does it select a private message based on viewpoint and require businesses to publish it. CADA has nothing to do with messages. It prohibits a form of business conduct—discrimination against customers—and applies that prohibition to all businesses without reference to expression. The *Barnette/Wooley* line of cases is inapplicable.

Petitioner insists that CADA "exact[s] a penalty on the basis of the content" of its speech. Pet. Br. 28 (quoting *Tornillo*, 418 U.S. at 256). That is incorrect. *Tornillo* and the other authorities on which Petitioner relies involve attempts by the State to compel a specific message. CADA does nothing of the kind. Petitioner is not forced to express any view about marriage or same-sex couples, and Masterpiece remains free to voice public opposition to marriage equality without penalty, as indeed the owner of the business has done. *See, e.g.*, Fox Business Channel, Jack Phillips Interview with Neil Cavuto (Aug. 14, 2015), <bit.ly/2yM4f9x>. CADA only requires a business that sells goods and services in the open market to treat customers equally.

This Court reaffirmed these limits on compelled speech doctrine in *FAIR*. The dispute in *FAIR* arose when law schools sought to escape a federal statute, the Solomon Amendment, 10 U.S.C. 983, that required them to host military recruiters at on-campus commercial job fairs, 547 U.S. at 51–53. The law schools sought to limit their involvement in military recruiting because they disapproved of military personnel policies that discriminated against gay applicants. *Id.* at 52. The Solomon Amendment required the schools to grant the military

access to campus on terms equal to those available to other recruiters. *See id.*at 52–55. When law schools created or disseminated speech as part of the service they offered other participants in the job fair, they had to do the same for military recruiters: "in assisting military recruiters, [the] law schools provide[d] some services, such as sending e-mails and distributing flyers, that clearly involve speech." *Id.* at 60. The Court found no First Amendment problem: "[The Solomon Amendment] neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy." The statute, the Court explained, "regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60. The Solomon Amendment was thus "a far cry from the compelled speech in *Barnette* and *Wooley*." *Id.* at 62.

CADA is an even further cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment protects a single entity (the military) and requires equal access in a specific setting (recruiting at colleges and universities). Thus, it was at least arguable in *FAIR* that federal law had conscripted schools to serve as ambassadors for a specific government recruiting message, using the schools' own speech as the vehicle—the kind of viewpoint-targeting that *Wooley* and *PG&E* appear to forbid. The plaintiffs in *FAIR* made that argument a centerpiece in their case, but this Court rejected it squarely: "The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the

school provides such speech for other recruiters." *Id.* at 62. This holding applies with more force to CADA. The Colorado law applies to all businesses that sell goods and services to the general public and it protects all people from the specified forms of invidious discrimination. Unlike the Solomon Amendment, CADA is a law of general applicability. It is even clearer that CADA "does not dictate the content of [any] speech at all." *Ibid.*

CADA does not compel orthodoxy. The statute neither imposes the State's own ideological message nor conscripts businesses to host a private viewpoint of the State's choosing. *Barnette*, *Wooley*, *Tornillo* and *PG&E* are inapplicable here.

B. CADA Does Not Force Speakers to Incorporate Unwanted Elements into Their Own Messages.

CADA also does not force speakers to incorporate unwanted elements into their own messages. When Petitioner sells goods and services to the general public, it is not a street-corner speaker engaged in the communication of its own message. Rather, it is engaged in a commercial transaction. The difference is fundamental. The line of compelled speech cases in which this Court has spoken about government hijacking or conscripting the expression of private speakers applies where a speaker steps forward to proclaim his own message. Those cases have no application when a business sells goods and services to paying customers in the commercial marketplace, where any message belongs to the customer.

Hurley v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), is the paradigm case here. *Hurley* involved a dispute between a gay

Irish-American group and the private organizer of a St. Patrick's Day parade in Boston. The gay group wanted to participate as a unit marching in the parade under its own banner, but the organizer refused. *Id.* at 560–562. The group sued under a state anti-discrimination statute and prevailed before the state court, which interpreted state law to extend outside the commercial market and ordered the organizer to admit the group. *Id.* at 561–564. This Court reversed, finding that this unusual and expansive application of the law violated the First Amendment's prohibition on compelled speech.

The ruling in *Hurley* was based entirely on the proposition that a parade is an "inherent[ly] expressive[]" event, *id.* at 568, and the parade organizer a "street corner" speaker who uses his own voice to convey his message to an audience, *id.* at 579. "[W]e use the word 'parade' to indicate marchers who are making some sort of collective point," the Court explained, "not just to each other but to bystanders along the way." *Id.* at 568, 579. The organizer must be able to select which units will march in a parade because "every participating unit affects the message conveyed by the private organizers." *Id.* at 572–73. The application of a public accommodations law to this private expressive event would force the organizer to alter a message he was presenting as his own.

Petitioner confuses the issue when it invokes *Hurley*. It says that cake decoration has expressive content that is entitled to First Amendment protection and then asserts that *Hurley* grants businesses that sell baked goods a right not to "alter what they communicate." Pet. Br. 27–28. The argument fundamentally misunderstands compelled speech doctrine. *Hurley* used the term "inherently expressive" to describe a setting in which a speaker

is engaged in communicating its own message. A parade organizer qualifies. A business selling goods and services to paying customers in the marketplace does not. It is the customer who stands in the shoes of the parade organizer here, not the vendor.

Indeed, it would probably come as a shock to any customer if a wedding vendor proclaimed itself to be the "speaker" in this setting. Imagine a vendor showing up at a wedding and announcing, "Here is how you must organize your ceremony, and here is what you must say. This may be your wedding, but you are using my cake—or my dress, or my photographic services—so this is *my* message. *I* am the speaker."

Here, too, *FAIR* provides clarity. Rejecting the law schools' attempt to invoke *Hurley*, the Court held that "a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs." 547 U.S. at 64. Those services "lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Ibid.* So too here. As the New Mexico Supreme Court explained, "[u]nlike the defendants in *Hurley*," a commercial vendor "sells its expressive services to the public. It may be that [the vendor] expresses its clients' messages * * * but only because it is hired to do so." *Elane Photography, LLC* v. *Willock*, 309 P.3d 53, 66 (N.M. 2013).

Customers that hire Masterpiece Cakeshop are not paying to facilitate a message chosen by Masterpiece or Mr. Phillips, any more than a client would pay a law firm to promote the firm's agenda. Customers hire Petitioner to provide the cake that the customers choose. As Mr. Phillips admits, he crafts his baked goods to meet the "desires, personalities, preferences and wedding details"

of his customers. Pet. Br. 8 (citing JA161). A commercial bakery is neither a "parade organizer" nor a "street corner speaker." *Hurley* has no application here.

CADA also does not require businesses to "endorse" the message of any customer when providing commercial goods and services. As the New Mexico Supreme Court explained, "It is well known to the public that wedding [vendors] are hired by paying customers and * * * may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)." *Elane Photography*, 309 P.3d at 69–70. This conclusion rests on a solid foundation. In *FAIR*, law schools attempted an endorsement argument, saying that "if they treat military and nonmilitary recruiters alike [at commercial job fairs] in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies," 547 U.S. at 64–65. The Court rejected the argument: "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65. In *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the Court rejected a similar argument by a shopping center that objected to a law requiring equal access to its property for groups engaged in demonstrations. As the Court explained, views expressed by private citizens at "a business establishment that is open to the public" would "not likely be identified with those of the owner," particularly where there was no "governmental discrimination for or against a particular message" and the business owner was free to "disavow any connection with the

message." *Id.* at 87. Equal access laws do not compel "endorsement" in a commercial setting.

CADA does not impose any state-chosen message on Petitioner. It does not regulate any "inherently expressive" setting in which Petitioner is a "street corner speaker" propounding its own message. And it does not require Petitioner to endorse any message of its customers. Masterpiece Cakeshop may prefer not to take business from gay people, but that desire does not transform a prohibition on discrimination into compelled speech.

C. Petitioner's Comparison of Its Baked Goods to Works by Great Artists is Inapposite.

These principles answer the array of comparisons that Petitioner advances. Petitioner likens the baked goods it sells to "an abstract painting like Piet Mondrian's Broadway Boogie Woogie, a modern sculpture like Alexander Calder's Flamingo, or a temporary artistic structure like Christo and Jeanne-Claude's Running Fence," insisting that Petitioner must be equally free to pursue his muse. Pet. Br. 20–21. The argument blurs the fundamental distinction between an artist producing her own work and a vendor selling goods and services in the commercial marketplace.

An artist is free to produce her own work according to her own inspiration, free from any government dictate about content. No painter or sculptor can be told what subjects to portray when creating her own work. But an artist who sets up a business in which she sells her skills to any paying customer in the commercial marketplace is no longer engaged in the creation of her own work. She is selling her skills for a fee. When the artist chooses to op-

erate that kind of business, she cannot discriminate against customers based on race, sexual orientation, or religion in violation of CADA, any more than a law firm can violate federal anti-discrimination law when choosing its employees or a private school when selecting its customers. *See Hishon*, 467 U.S. at 78; *Runyon*, 427 U.S. at 175–176.

Suppose that a painter was to set up a store and offer to paint the portrait of any paying customer, advertising her business to the general public. When a white male customer enters the store, however, the owner turns him away, saying, "I don't paint portraits of white men." The store would stand in violation of CADA, and the First Amendment would pose no obstacle to liability. The painter brings her artistic talents to her work and creates a product with undoubted artistic value, but she is not engaged in her own act of expression when she runs a portraits-for-hire store. The store creates the product specified by the customer, it does not get paid to engage in its own act of expression. That fact renders compelled speech doctrine inapplicable. Discrimination against customers in this setting is commercial conduct the State may prohibit. *See FAIR*, 547 U.S. at 60.

In contrast, consider an artist who paints on her own time, choosing subjects according to her own inspiration, and then sets up a store to sell her completed work to the public. *Barnette* and *Hurley* would invalidate any law that dictated the content of the painter's work. She engages in her own act of expression when choosing her subjects and creating the work, and interference by the State would constitute a regulation of her message. However, when the same artist displays her work in a store and sells it to the general public, she may not turn

away customers based on race or sex, even if she would prefer not to sell her art to certain types of people. Selling the finished product in the market is business conduct, and a public accommodations law can prohibit discrimination in that conduct without any threat to First Amendment values. *Hishon*, 467 U.S. at 78.

III. Petitioner's Position Would Replace a Clear Rule with an Unworkable Standard That Has No Limiting Principle.

This Court's cases set forth a clear rule: When a business sells goods and services in the public market, it must abide by neutral regulations on commercial conduct. The Free Speech Clause protects businesses from content-based regulation of their goods and services and prohibits laws that would force businesses to promulgate a government-chosen message, but it poses no obstacle to neutral conduct regulations. This Court has consistently adhered to that rule in the commercial marketplace, and for good reason. As Justice O'Connor emphasized, a clear rule rejecting any ability of "commercial associations" to "gain protection for discrimination" has been necessary to avoid "cast[ing] doubt on the power of States to pursue the profoundly important goal of ensuring nondiscrimimatory access to commercial opportunities in our society." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 632–635 (1984) (O'Connor, J., concurring).

The position that Petitioner advances would destroy that clarity. Cobbling together broad statements of principle and rhetorically powerful sentences from a wide array of precedents, Petitioner asks this Court to head down a path marked by no discernable standards and no obvious stopping point. If a bakery can claim a special exemption from anti-discrimination laws because it sells

pastries that involve some artistic ability, then any business that sells goods or services involving skill with images or words could argue for a similar exemption. Petitioner's own papers indicate as much. *See* Pet. Br. 21 ("The First Amendment protects Phillips's wedding cakes regardless of whether he writes words on them or adorns them with bride and groom figurines. All his wedding cakes are custom-designed and distinctively recognizable as 'markers for weddings.'").

The result would be a morass. The enforceability of myriad commercial regulations would be in question, and ordinary business-conduct cases would be transformed into constitutional disputes. Lower courts would be plagued with unanswerable questions: which goods are artistic enough, and which commercial services involve sufficiently distinctive use of language, to create a colorable argument for a First Amendment exemption to general business regulations? Could an architecture firm require searching First Amendment scrutiny for every safety regulation or zoning law that "compels" it to "change the content of its artistic message" in designing a structure? Could a tailor refuse to sell custom clothes to any customer based on race or religion in order to avoid the "compulsion" of creating "custom-made art" for customers the owner reviles? *See* Gov't Br. at 27 (asserting that a "jewelry designer" could turn away unwanted customers). The doctrine would be unsustainable, and Petitioner provides no limiting principle to suggest otherwise.

The Speech Clause gives broad protection to businesses that sell products and services that contain some expressive or artistic element. It prohibits government from dictating their creative choices, as in *Velazquez*,

prevents the State from selecting ideological messages and using businesses as tools for their dissemination, as in *Tornillo* and *PG&E*, and protects the right of business owners to engage in their own expression, as Masterpiece Cakeshop itself has done. But the First Amendment does not entitle businesses to operate without any restriction on their conduct. Discrimination against customers and employees in the market is business conduct that "has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78. This Court has consistently adhered to that clear rule. It should do so again here.

CONCLUSION

The judgment of the Court of Appeals of Colorado should be affirmed.

Respectfully submitted,

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